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In the Supreme Court
OF THE
United States

October Term 1972

No. 72-1652

United States Immigration and Naturalization Service, *Petitioner*

vs.

Marciano Haw Hibi, *Respondent*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

MEMORANDUM OF MARCIANO HAW HIBI, RESPONDENT, IN OPPOSITION

OPINIONS BELOW

The opinions of the Court of Appeals and District Court are adequately reported in the petition. Findings and recommendations of the designated naturalization examiner, however, are merely proposed findings and recommendations in adversary proceedings which were rejected by the courts below and which should not be identified as opinions below.

JURISDICTION, QUESTION PRESENTED, STATUTES INVOLVED, AND STATEMENT OF THE CASE

These are adequately set forth in the petition.

REASONS FOR DENYING THE WRIT

SUMMARY OF ARGUMENT

1. Denial of the writ would do no more than compel the Government to honor a long overdue promise made by Congress to encourage service in the armed forces of the United States during World War II.

2. The Commissioner of Immigration had a legal duty to implement Section 702 of the Nationality Act of 1940 by sending representatives to naturalize qualified members of the armed forces overseas. By revoking the authority of his representative in the Philippines in 1945, the Commissioner prevented Filipino soldiers from being naturalized. The Commissioner's conduct, in derogation of his duty, thwarted the will of Congress and violated the constitutional doctrine of the separation of powers.

3. The decision below was hardly a novel or inappropriate application of equitable estoppel. That principle has been applied any number of times to the Government in the interests of justice and good conscience. There is no difference, for purposes of estoppel, between an affirmative misrepresentation and the failure to speak or act when there is a duty to speak or act.

4. Denial of the writ would not have the impact pictured by petitioner upon the administration of

present immigration law. The figures suggested by petitioner with respect to the number of others who might benefit from the decision below have no foundation in fact and are totally wrong.

ARGUMENT

I.

The Deliberate Refusal of the Commissioner Of Immigration To Implement The Wartime Naturalization Law With Respect To Philippine Scouts in 1945 Violated The Constitutional Doctrine Of The Separation Of Powers.

Congress added Sections 701 through 705 to the Nationality Act of 1940 less than four months after the attack on Pearl Harbor. The new law had a very plain purpose. It was to offer American citizenship to certain non-citizens, many of whom could not otherwise qualify, in exchange for their service in the armed forces of the United States during the war.

Section 702 made special provision for soldiers and sailors on duty overseas who could not come to courts in the United States where persons ordinarily apply for naturalization. To make sure eligible servicemen overseas would have a chance to apply, Section 702 called for designation by the Commissioner of Immigration of representatives whose duty it was to naturalize servicemen in the overseas theaters of war.

The language of Section 702 makes two things readily apparent. The first is that servicemen were eligible for overseas naturalization only "while serving" overseas. Therefore, once a serviceman was dis-

charged, he would lose the benefits of 702 and, if he could not qualify through ordinary naturalization procedures, he might lose forever his chance to become an American citizen.

The second aspect of Section 702 follows from the first. The offer of citizenship made by the section would be without meaning unless qualified servicemen were notified of their right to apply and designated representatives were actually sent overseas to do their job while such servicemen were still on active duty overseas. Therefore, when the Commissioner deliberately revoked the authority of his representative to naturalize servicemen in the Philippines in 1945, he not only made it impossible for Mr. Hibi to accept the offer made to him by Congress, he also thwarted the will of Congress as expressed in 702 and effectively nullified a duly enacted provision of law.

Nowhere in the law is it written and from nothing in the law can it be implied that the Commissioner of Immigration had the discretion to withhold the benefits of Section 702. Plainly, Congress extended the offer of citizenship to *all* who might qualify. Clearly, the job of making that offer effective was placed in the hands of the Commissioner and he had neither statutory nor constitutional authority to ignore his unequivocally stated obligation.

The duty of the Commissioner to carry out the law is made plain not only by Section 702 itself. It is of course mandated by Article II, Section 3 of the Constitution, which commands the President to "take care that the Laws be faithfully executed . . ." Moreover,

the Commissioner's duty was also spelled out by Section 705 of the Act which directed the Commissioner "to make such rules and regulations, *as may be necessary to carry into effect the provisions of this Act.*"

Never in the history of the United States has any naturalization statute ever delegated to the Executive Branch any authority or discretion to choose among applicants for naturalization. Constitutional authority to provide for naturalization rests exclusively with Congress, and such authority is limited to the provision for a "uniform rule of naturalization." (Article I, Section 8, Constitution of the United States; *Chirac v. Chirac,* 15 U.S. 259 (1817).) A statute, therefore, which attempted to delegate to the Executive Branch the discretion to discriminate against a group of applicants who had met the statutory requirements would not be a uniform rule and therefore would be unconstitutional. In any event, no such delegation of authority was expressed or contemplated by the statutes at issue here.

Of course, given the conditions of war, it is quite true, as petitioner contends, that some soldiers and sailors were bound to miss the opportunities offered them by Section 702. Admittedly, battle conditions might have kept the requisite notice from getting to every single serviceman or might have prevented naturalization representatives from reaching every foxhole on every battlefront.

That, however, is not what this case is all about. No one is saying the Commissioner was required to do the impossible or that he neglected his obligation

to other servicemen in other parts of the world. Rather, this case involves the deliberate and calculated decision of the Commissioner of Immigration, with the consent of the Attorney General of the United States, to single out Filipino soldiers in the Philippines and to deny to *all* of them the opportunity to accept the offer of citizenship tendered them by Congress. In other words, there is a big difference between a good faith attempt to notify those who were qualified and the obligation to refrain from actively and intentionally depriving an individual or group of individuals from access to the person whose job it was to naturalize them.[1]

By deliberately refusing to do what Congress plainly wanted done, the Commissioner usurped the constitutional authority of Congress to enact the laws. The Commissioner also failed to obey his constitutional mandate to enforce the laws. As this Court has already said with respect to the separation of powers:

> "In the framework of our Constitution, the President's power to see that the laws are faithfully executed refutes the idea that he is a lawmaker. The Constitution limits his functions in the lawmaking process to the recommending of laws he thinks wise and the vetoing of laws he thinks bad. And the Constitution is neither si-

[1] At least one immigration official recognized the Commissioner's conduct for what it was. The official was Edward J. Shaughnessy, special assistant to the Commissioner who wrote him on October 19, 1945 that withdrawal of the representative had created "the rather anomalous situation that while we recognize in law the legal right of these persons to the benefits under the Act we have from an administrative standpoint, made it impossible for such persons to acquire these benefits." (Clerk's Transcript of Record, p. 152.)

lent nor equivocal about who shall make the laws which the President is to execute."

(*Youngstown Sheet and Tube Co. v. Sawyer*, 343 U.S. 579, 587 (1952).)

II.

Foreign Policy Considerations Could Not Justify The Commissioner's Decision To Withhold The Benefits Of Section 702.

There are any number of things wrong with petitioner's argument that "compelling foreign policy considerations" justified the Commissioner's action.

First of all, the Philippines was not then a foreign government. It remained a possession of the United States and was not fully self-governing until its independence on July 4, 1946. Filipinos were then nationals of the United States, a status not carrying the rights of citizenship, but commanding their allegiance nevertheless to the United States. There were, in other words, no principles of international comity at stake.

Moreover, Congress itself had provided for Philippine independence before the outbreak of World War II.[2] Congress knew that independence would follow soon after the war. Yet despite these considerations, it offered full American citizenship to Filipino soldiers. It may be assumed that by doing so Congress had no intention of attaching any strings to its offer that might involve Philippine independence or subsequent foreign policy consideration.

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[2]The Philippine Independence Act, March 24, 1934, 48 Stat. 456.

Nor do the cases cited by petitioner (*Tai Mui v. Esperdy,* 371 F.2d 772 (2d Cir. 1966) cert. den. 386 U.S. 1017 and *Cheng Ho Mui v. Rinaldi,* 408 F.2d 28 (3rd Cir. 1969)) support the view that the Commissioner acted within his statutory authority. While those cases sustained the Immigration Service in its decision not to open an office in the Far East to process applications for the admission of refugees, they offer no support to petitioner here because of a fundamental difference between the statutes involved.

In the present case, Section 702 created the right of qualified individuals to apply for naturalization, a right earned by them in exchange for honorable wartime service. Being a right, it could be waived only by the individual to whom it belonged. (*Johnson v. Zerbst,* 304 U.S. 458 (1938).)

No *quid pro quo,* or statutory right, however, is involved in the admission of refugees.

Nor did the Courts in *Tai Mui* and *Cheng Ho Mui* conclude that they were without the power to act. Rather, they decided not to intervene only because a showing of discrimination against Chinese refugees had not been established by the facts. Moreover, there is no statutory time limit upon the admission of refugees and the statute does not preclude applicants from traveling to and applying at other American outposts overseas. In the present case, however, the benefits of Section 702 were deliberately and specifically denied to Filipinos exclusively. Their eligibility to apply was limited to the time of their active

duty. And there was no way, while on active duty, they could seek out a naturalization representative in some other part of the world.

Second. Petitioner has failed to show the "compelling" nature of whatever foreign policy considerations the Commissioner of Immigration may have had in mind.

Obviously, the Commissioner was worried about the number of Filipinos who might leave the Philippines for America. But his conclusions were hardly warranted by the evidence of record. According to the record, the Commissioner's action was prompted by a letter dated September 10, 1945 written to him by the Chief of the Passport Division of the Department of State. The letter referred to a dispatch from the American Consul General in Manila concerning the apparently large number of Filipino soldiers who might wish to apply for citizenship under Section 702. The letter made no mention of any concern or objection by the Philippine Commonwealth Government.

Nevertheless, three days later, on September 13, 1945, the Commissioner wrote to the Attorney General asking for permission to revoke the authority of his naturalization representative in the Philippines. Noting that Filipino soldiers could be naturalized only by his representative in the Islands, the Commissioner concluded:

> "In view of the concern expressed by the Philippine Government, it is my belief that the situation might best be handled by revoking the authority previously granted to Mr. Ennis and by omitting

> to designate any representative authorized to confer citizenship in the Philippine Islands. This course would eliminate a source of possible embarrassment in our dealings with the Philippine people, who probably will be awarded independence in the near future."

The Attorney General gave his consent on September 26, 1945.[3]

What appears in the petition then as "compelling foreign policy considerations" is not shown by the record to have been any more than the Commissioner's hasty jump to an unwarranted conclusion. In any event, the record reveals no effort before summarily withdrawing the naturalization representative to obtain official information from the Philippines, no effort to make any reliable estimate of the numbers who might apply, or what effect their applications might really have upon the Philippine Government or U. S. relationships with it.

Third. Contrary to petitioner's comment at page 13 of the petition, the Commissioner and Attorney General were indeed compelled to ignore the wishes of the Philippine Government concerning the naturalization of Filipino soldiers.

They were compelled to ignore the wishes of the Philippine Commonwealth Government by Section 1999 of the Revised Statutes, which had incorporated into statutory form what we have recognized since our own independence as "the natural and inherent

[3]Copies of these letters are found in Clerk's Transcript of Record, pp. 144-146.

right of all people" to freely abandon the citizenship of one country for that offered by another country. To implement that historic principle, the statute proclaimed:

> "Any declaration, instruction, opinion, order or decision of any officer of the United States which denies, restricts, impairs, or questions the right of expatriation, is declared inconsistent with the fundamental principles of the Republic."[4]

The message of the statute then is crystal clear, and while Section 1999 was a response to claims made upon persons already naturalized as Americans by the countries of their former nationality, a "natural law" of expatriation is surely broad enough to protect against foreign interference those who ask for, but have not yet been given, the nationality of a new country. Plainly, the wishes of the Philippine Government, whatever they may have been, could not be controlling.[5]

III.

The Decision Below Was A Proper Application Of The Principle Of Equitable Estoppel.

The real issue before the Court is whether the Government should be compelled to honor the promise it made to Mr. Hibi that he could become an American citizen by reason of his service in the Army of the United States during World War II.

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[4]Act of July 27, 1868, 15 Stat. 223. The statute was in effect in 1945, 8 U.S.C.A. 800, 1942 ed.

[5]The War of 1812, of course, was fought in part to establish this very principle.

Equitable estoppel is only the name for a legal principle employed by the courts below to enforce that promise. Since it is a principle founded in "justice and good conscience" (2 *Pom.* Eq. Jur. Sec. 802), its application to the facts of this case can hardly be called unprecedented or erroneous.

The "vital principle", as this Court has declared, "is that he who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted." (*Dickerson v. Colgrove,* 100 U.S. 578, 580 (1879).)

Therefore, while the events of this case may be described in the traditional terminology of equitable estoppel, it is the overriding commands of justice and good conscience which make the difference. Do justice and good conscience, in other words, require the government of the United States to honor the commitment it made to Mr. Hibi and other Filipino soldiers during the dark early days of World War II?

Plainly, they do. Respondent was eligible for naturalization only as long as he remained on active duty. With other Philippine Scouts, he could be naturalized only by a designated representative in the Philippines. The Commissioner knew this. Yet, notice of respondent's right to apply was never given him either personally or to the Unit in which he served, and the naturalization representative was withdrawn for the express purpose of preventing the naturalization of Mr. Hibi and other Filipino soldiers at the only time

they could apply, i.e., while on active duty. Petitioner, disregarding the basic nature of estoppel, asks how respondent could be prejudiced if he was unaware of his eligibility until it had lapsed (Petition, p. 13, footnote 7). But it was precisely respondent's lack of knowledge, coupled with withdrawal of the representative which in fact prejudiced respondent. Surely, respondent, after nearly five years of Army service would have no way of suspecting that he would give away his right to apply for citizenship by leaving the Army when the war was over. In orthodox estoppel terms, wasn't his decision to leave the Army a "detrimental reliance" upon the Government's failure to implement the provisions of Section 702?

The District Court found that respondent would have applied for citizenship had he been given a "fair opportunity". Thus, but for the Government's failure to do what the law clearly commanded, respondent would have been an American citizen for the past 28 years. "It is safe to assert" this Court has declared, "that nowhere in the world today is the right of citizenship of greater worth to an individual than it is in this country. It would be difficult to exaggerate its value and importance. By many, it is regarded as the highest hope of civilized men." (*Schneidermann v. United States,* 320 U.S. 118, 122.) If the Government's conduct in denying respondent the opportunity to enjoy American citizenship was not prejudicial, then what was it? Petitioner's concern obviously is not with the underlying equity of respondent's cause. Instead, petitioner would permit the Government to

escape its part of the wartime bargain on the basis of antiquated concepts of sovereign immunity, authority taken out of context, a meaningless distinction between affirmative misrepresentation and a failure to act at all, and finally, upon an inappropriate application of the doctrine of laches.

Such as it was, the tradition of governmental immunity began centuries ago when scholars of the day concluded that "The King cannot be estopped, for it cannot be presumed the King would do wrong to any person." (15 Halsbury's Laws of England (1956), quoting from Bacon's Abridgements.)

It is no wonder that courts in recent years have cast aside that kind of logic and have not hesitated to estop the Government in appropriate circumstances. This is particularly true in cases involving immigration and citizenship.[6]

Petitioner's reference to Professor Davis' view on the subject is taken out of context (Petitioner, p. 15). Far from suggesting the desirability of immunity to the Government's sovereign capacities, Professor Davis was attempting only to compare two decisions of this Court, *Federal Crop Insurance Corp. v. Mer-*

[6] *Brandt v. Hickel*, 427 F.2d 53 (9th Cir. 1970);
Hetzer v. I.&N.S., 420 F.2d 357 (9th Cir. 1965);
Tejeda v. I.&N.S., 346 F.2d 389 (9th Cir. 1965);
McLeod v. Peterson, 283 F.2d 180 (3d Cir. 1960);
Lee Wing Hong v. Dulles, 214 F.2d 753 (7th Cir. 1954);
Podea v. Acheson, 179 F.2d 306 (2d Cir. 1950);
Lee Bang Hong v. Acheson, 110 F. Supp. 48 (D.C. Hawaii 1951);
Lee Hong v. Acheson, 110 F. Supp. 60 (D.C.N.D. Cal. 1953).
These cases, incidentally, involved both the affirmative misrepresentation and a failure to act on the part of Government officials.

rill, 332 U.S. 380 (1947) and *Moser v. United States,* 341 U.S. 41 (1951).

Professor Davis' point was that the cases would have been easier to understand if the Court had reached opposite conclusions, for in *Merrill,* a case involving the Government's proprietary capacity, the Court ruled out estoppel whereas *Moser* involved a sovereign capacity of the Government and yet the Court accepted the idea of estoppel. Taken in context, his views cannot be considered authority favoring the concept of sovereign immunity.

Petitioner correctly asserts that the decision below would in this instance nullify 8 U.S.C. 1421(e). But that is the whole point of estoppel. For it would be unjust and unconscionable to require Mr. Hibi to comply with present day standards when the Government's own conduct prevented him from applying at the time when he was eligible. Estoppel is "a rule of justice which, in its proper field, prevails over all other rules." (*United States v. Georgia-Pacific Co.,* 421 F.2d 92, 96 (9th Cir. 1965.))[7]

Moreover, isn't it inconsistent of petitioner to insist now that Courts have no authority to by-pass 8 U.S.C. 1421(e) no matter what the injustice when the very same Immigration and Naturalization Service deliberately ignored and by-passed the explicit mandate of Sections 702 and 705?

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[7]In *Petition of Macachor,* No. 158858, unreported, (D.C.N.D. Cal. 1966) the Court granted a petition for naturalization on the principle of estoppel despite 8 U.S.C. 1421(e). Petitioner was not sufficiently upset with the decision to appeal.

Petitioner seems to agree that estoppel might be proper if Mr. Hibi had relied upon an express or "implied assertion" of Immigration officials. But does petitioner really see a difference between an affirmative misrepresentation and the failure to speak or act at all in circumstances creating a duty to speak or act? Estoppel has never been limited to affirmative misrepresentations.

> "Equitable estoppel, in the modern sense, arises from the conduct of a party, using that word in its broadest meaning as including his spoken or written words, his positive acts, and his silence or negative omission to do anything."
>
> 2 *Pom.* Eq. Jur. Sec. 802. See also *Wiser v. Lawler,* 189 U.S. 260, 270; *Dickerson v. Colgrove,* 100 U.S., 578, 580; and a host of cases cited in 31 Corp. Jur. Sec., Estoppel, Sec. 72, p. 439.

Finally, petitioner blames Mr. Hibi for waiting 20 years and argues that his petition ought to be denied on a theory of laches. Petitioner ignores the fact that Mr. Hibi did inquire at the American Embassy in Manila when he learned of his lost opportunity in 1946 or 1947. He was then told that he could not qualify for naturalization without entering the United States as an immigrant, a course made impossible for him by reason of our then restrictive immigration quotas. What more would petitioner have him do?

Laches would not be a proper argument anyway because it is appropriate only where delay has prejudiced the other side. Delay has not prejudiced peti-

tioner in this instance. For even assuming respondent were given notice, the Commissioner made it impossible for him to apply by withdrawing the naturalization representative while respondent was still on active duty. There is no way the passage of time could change that fact. If petitioner asks this Court to apply the doctrine of laches, should it not at least come to Court with "clean hands"? That would seem a more appropriate equitable principle for the Court to apply.[8]

IV.

The Decision Below Will Not Have The Impact Pictured By Petitioner.

The specter that petitioner has envisioned of thousands of Filipinos descending upon American shores if the decision below is affirmed is founded upon an erroneous statement of the numbers involved.

Had petitioner bothered to consult official sources rather than rely upon the estimates of anonymous State Department officials whose facts are wrong and whose mathematics are questionable, petitioner would have discovered the following:

By law, the number of Philippine Scouts as of December 7, 1941, was limited to 12,000. (Section 7,

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[8]On the subject of notice, petitioner refers to War Department Circulars requiring such notice and entry upon the individual's service record (Petition, pp. 10, 11). Respondent was re-enlisted into the Army of the United States on April 7, 1945 when American forces returned to the Philippines and after the specified procedures had been adopted. The required notation does not appear in his service record. Moreover, just why should these procedures have been limited to servicemen in the United States proper?

Act of Feb. 2, 1901, 31 Stat. 748, 757.) The actual strength of the Scouts on November 30, 1941, was 11,957. (*Morton,* U. S. Army in World War II, Fall of the Philippines, Department of the Army, 1953, p. 49.) Soon after the Japanese invasion, the full strength of 12,000 was reached. (*Morton, supra,* p. 71.)

During the Japanese occupation, the Scouts were scattered to all parts of the Philippine Islands. When U. S. forces returned in 1945, about 6,800 returned to active service before V-J Day.[9]

On December 28, 1945, Congress added Section 706 to the Nationality Act of 1940 and provided that eligibility under 701 and 702 would be limited to persons serving on active duty prior to that date. 59 Stat. 658.

Therefore, even though P.L. 190, 79th Cong. enacted on October 6, 1945, authorized an increase in the strength of the Philippine Scouts to 50,000, only those who had served before December 28, 1945 were entitled to the benefits of 702. In any event, according to Col. Jessup, only 200 men had enlisted in the new Scouts by mid-January, 1946 under the new authorization.

According to the petition itself, more than 4,000 eligible Scouts who had the good fortune to stay in the Army were naturalized in the Fall of 1946 when

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[9]This figure was given to us by Col. John E. Jessup, Jr., Chief of the Histories Division of the Department of the Army by letter dated July 24, 1973. Colonel Jessup could not account for the remaining 5,200, except to assume that many had been killed on Bataan, had died in prisoner camps or while fighting as guerrillas during the occupation, or were missing for a variety of reasons.

another representative was finally sent to the Philippines (Petition, p. 13 and App. 42a). Subtracting that number from the 6,800 who returned to duty there could now exist a maximum of 2,800 former Scouts who would be eligible for naturalization under 702 if the decision below is affirmed. By any reasonable estimate, it is difficult to imagine that any more than a fraction of such a number would be able to come to the United States to apply for naturalization at this late date. The best evidence of that is the fact that even though Mr. Hibi's petition has been pending for nearly six years, and news of his application long since has spread to the Philippines, only 139 men have filed similar applications in the United States, less than 25 per year.[10] Such figures hardly constitute an unbearable burden upon our present immigration administration.

Finally, petitioner's assertion that the decision below might apply to places other than the Philippines is also wrong. The wartime naturalization law did not apply to all alien servicemen, but only to noncitizens who had been previously admitted into the United States or its possessions or territories, including the Philippines. Moreover, there is no showing that the Immigration Service ever deliberately failed to send representatives to other theaters of war. It was only Filipinos, such as Mr. Hibi, who were singled out and denied their rights under the law.

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[10]These figures were supplied us by Edward Rudnick, Assistant Commissioner, Naturalization, Immigration and Naturalization Service.

CONCLUSION

Marciano Haw Hibi joined the Philippine Scouts in February 1941. Side by side with other Philippine and American soldiers, he took part in the gallant defense of Bataan and Corregidor, at the very moment Section 702 was being enacted. He endured the infamous death march following surrender of the Philippines. He was a prisoner of war. Abiding by his own duty, he rejoined the U. S. Army when the Army returned to the Islands in early 1945. If ever a person deserved the opportunity offered by Section 702 it is this brave man. It is puzzling, therefore, why the Government should wish to deny him now the benefits of that long overdue promise.

This Court has not hesitated before to hold the Government of the United States to its promise on the principle that "Great nations, like great men, should keep their word." (*Astrup v. I. & N.S.*, 91 S.Ct. 1583 at 1586 (1971).) Much American blood has been spilled in recent years to honor commitments of our Government. Thankfully no such sacrifice is required in this instance. The decision below is obviously correct, and consideration by this Court is unnecessary. The writ should be denied.

Dated, San Francisco, California,
August 6, 1973.

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Marciano Haw Hibi.

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Of Counsel.